

THE COMMERCE ACT

AVOIDING ILLEGAL AGREEMENTS

New Zealand businesses may have good reasons to talk with their competitors, for example to discuss industry-wide issues and practices, or to share knowledge and technical information. These discussions are not unlawful in themselves. However, businesses should take care not to engage in anti-competitive behaviour that may breach the Commerce Act. All businesses should familiarise themselves with the relevant provisions of the Commerce Act, and take steps to ensure they are not at risk of breaching the Act. By being familiar with the Act businesses also will be able to recognise anti-competitive behaviour and can take steps to ensure that their business is not harmed by breaches of the Commerce Act by others.

The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of New Zealanders.

WHAT IS UNLAWFUL?

Businesses and consumers should be aware of the two key provisions of the Commerce Act:

- section 27, which makes anti-competitive agreements unlawful. It prohibits anyone from entering into, or implementing arrangements with the purpose, or effect or likely effect, of substantially lessening competition. Arrangements can include contracts, agreements or understandings; and

- section 30, which makes price-fixing agreements between competitors unlawful. This includes agreements with the effect of fixing, controlling or maintaining prices, or that provide a mechanism for doing so.

An agreement can be a formal document, such as a contract. An agreement can also be very informal. Courts have ruled that an agreement could be formed through ‘a nod and a wink’ between businesses.

Under section 27 no one may enter into or implement an agreement that substantially lessens competition in a market. To decide whether competition has been substantially lessened, the court considers the impact of the agreement on the overall competitive process. In respect of arrangements that influence pricing, the court will assess whether other market participants can compete effectively (for example, whether the agreement limits competitors’ ability to set their own prices, quality standards, output volumes and market strategies). The court also will assess how difficult it is for new competitors to enter the market.

Under section 30, the following four kinds of agreements between competitors are unlawful because they tend to fix, control or maintain prices:

- price fixing;
- bid rigging;
- market sharing; and
- agreements to restrict output.

These kinds of agreements are sometimes referred to as cartel agreements. These types of agreements are considered to substantially lessen competition, because in practice they are almost always harmful. These agreements aim to maximise the profits of cartel members, while maintaining the illusion of competition. Cartel conduct can damage the economic welfare of New Zealanders by raising prices and reducing choice, innovation, quality and investment.

ATTEMPTS BREACH THE COMMERCE ACT

It is also unlawful for a business or an employee to:

- attempt to reach an agreement that breaches section 27 and/or section 30;
- induce another person to breach section 27 and/or section 30; and/or
- aid or assist another person in breaching section 27 and/or section 30.

An agreement can be a formal document, such as a contract.
An agreement can also be very informal. Courts have ruled that an agreement could be formed through ‘a nod and a wink’ between businesses.

EXEMPTIONS UNDER THE COMMERCE ACT

There are some exemptions to section 30, including:

- joint venture arrangements (section 31);
- certain recommendations about the price of goods and services provided they apply to not less than 50 people (section 32);
- certain joint buying or advertising arrangements (section 33); and
- partnership arrangements between individuals (section 44(1)(a)).

PRACTICAL TIPS

There are a number of steps businesses can take to ensure that they do not risk an allegation of anti-competitive conduct under the Commerce Act:

- Make sure that you and your staff are familiar with the requirements of the Commerce Act.
- Review internal documentation, policies and procedures for compliance with the Commerce Act.
- Do not exchange pricing information with competitor businesses.
- If you are approached by a competitor business to discuss pricing you should raise an objection straight away. Leave the discussion immediately.
- If you are approached by another business to discuss allocating customers, bids for contracts or restrictions on outputs you should raise an objection straight away. Leave the discussion immediately.
- If you become aware of anti-competitive conduct, you should contact the Commerce Commission straight away.

TRADE ASSOCIATIONS AND THE COMMERCE ACT

Belonging to a trade association can bring many benefits for members. Trade associations play a useful role in enabling businesses to meet and discuss industry-wide issues and practices and to share knowledge and technical information. The Commission has developed guidelines about the Commerce Act and trade associations. The guidelines can be downloaded from www.comcom.govt.nz/trade-associations

PENALTIES

If the courts find an individual or body corporate has breached the Commerce Act, penalties can be heavy. The maximum penalties are:

- \$500,000 for an individual; or
- for an organisation,
 - the greater of \$10 million, or
 - three times the commercial gain (if this can readily worked out) or 10 per cent of turnover.

LENIENCY POLICY

The Commerce Commission has a leniency programme to encourage those in a cartel to stop their involvement, break up the cartel and limit the damage caused by the cartel.

The first cartel member to inform the Commerce Commission about the cartel, by applying for conditional immunity, will receive conditional immunity from prosecution. The main condition on which immunity is provided is that the cartel member fully cooperates in the investigation and any subsequent proceedings. The Commission's leniency policy and guidelines are available on the Commission's website at www.comcom.govt.nz/cartel-leniency-policy

IMPORTANT NOTICE

Although this fact sheet covers the main coordinated behaviour issues for businesses and their advisers, it does not cover every Commerce Act issue that may arise. It is not intended to be:

- a binding statement of how the Commission will exercise discretion in a particular situation;
- a substitute for legal advice; or
- a restatement or definitive interpretation of the Commerce Act.

Anyone in doubt about whether they may be affected by the legislation should consider seeking legal advice.

To check for updates visit
www.comcom.govt.nz/anti-competitive-practices

This fact sheet is part of a series looking at the Commerce Act and anti-competitive practices. Other fact sheets in this series can be downloaded from
www.comcom.govt.nz/anti-competitive-practices

CONTACT

Contact the Commerce Commission with information about possible breaches of the Commerce Act.

TELEPHONE

Our Contact Centre during office hours on 0800 943 600

WRITE

To us at Contact Centre,
PO Box 2351, Wellington 6140

EMAIL

Us at contact@comcom.govt.nz

This fact sheet is a guideline only and reflects the Commission's view. The publication is not intended to be definitive and should not be used instead of legal advice.

It is businesses' responsibility to remain up to date with legislation.

Only the courts can make an authoritative ruling on breaches of the Commerce Act.